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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 728

NORTH PIER TERMINAL CO.,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

NORTH PIER TERMINAL CO.,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, North Pier Terminal Co., respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and in support of its petition shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a test suit, brought by the respondent Interstate Commerce Commission, and seeking a decision by the courts as to the legality under the Interstate Commerce Act of

payments made by numerous motor carriers to petitioner. The case involves written contracts between petitioner and the various common carriers and the Commission asserts that the payments are unlawful rebates because made pursuant to contract without special tariff provision. The contracts were undertaken by the carriers and petitioner under the following circumstances:

Petitioner operates a terminal building in which it rents space to some 75 tenants; the tenants ship freight interstate over the lines of more than 100 different motor common carriers, who are subject to the Interstate Commerce Act. (R. 60-1) The carriers' tariffs provide rates for such transportation and the shippers pay the full rates and charges so provided. (R. 65)

The tariffs of the motor carriers specify that the rates include, without additional charge, the service of receipt and pick-up of the freight at points accessible to carriers' vehicles at any and all business establishments in Chicago, including petitioner's building. (R. 65) There are at petitioner's building more than 90 different doors and platforms that answer the tariff test of accessibility and these are located both in front and at the rear of the building, which is a third of a mile in length. (R. 60-1)

In an effort to save on the high cost of multitudinous pick-ups at 90 individual shippers premises, and to alleviate serious congestion of carriers' vehicles, the carriers engaged petitioner to provide at its building two freight stations and these stations were to answer the test of accessibility to carriers' trucks. (R. 62, 80) By identical contracts each of the carriers employed petitioner as its agent to receive and receipt for freight in the name of the carrier at such stations. The stations were available to all shippers, who had the option of tendering freight to petitioner as

agent at the stations or to carriers' drivers at individual loading platforms. (R. 64-5)

Under this arrangement, carriers' vehicles loaded from the stations at carriers' convenience and petitioner assisted by safeguarding, handling and accounting for the property until loaded. (R. 63-4) Petitioner received compensation of 4 cents for each 100 pounds of freight received and handled through the stations. No part of the payments to petitioner was turned over to any shipper. Petitioner handled no freight of which it was either shipper or owner. (R. 65)

The tariffs of the carriers contained no reference to the contracts, nor to the functions or compensation of petitioner. (R. 65)

The foregoing arrangement was in effect under oral agreement for more than six years. (R. 61) During this time the parties made full disclosure and reports of their practices and arrangements to the Commission. (R. 26-33)

On March 7, 1946, the carriers and petitioner were addressed in a letter by the Commission's District Director at Chicago. The letter cited a recent decision of the United States Circuit Court of Appeals for the Sixth Circuit (*C. & D. Motor Delivery Co.* v. *U. S.*, 150 F. 2d 250) and the District Director concluded that the above described arrangement of petitioner was unlawful. The Director warned the parties not to continue their practice. (R. 34-5) The cited case involved a public warehouseman who acted as representative of the shipper in consigning shipments. The services for which he was paid by the carriers included picking up shipments at various points in the warehouse and assembling them at one point for loading. Petitioner does not perform shipping services for its tenants and does not collect shipments. (R. 53, 65) Subsequently, the agreements between petitioner and carriers were reduced to writing and continued in effect. (R. 61)

The Commission did not exercise its own jurisdiction to undertake formal investigation and enter an order based upon findings. Instead it applied to the courts for a determination of the controversy, bringing this suit for an injunction, as authorized in Section 222 (b) of the Interstate Commerce Act (49 U.S. Code, Sec. 322(b)). The Commission charged therein that the arrangement was undertaken for and on behalf of petitioner's tenants, the shippers, without requisite tariff authority, disregarding that the tariffs provide generally for store door pick-up throughout the city. It alleged that the practices of petitioner and the motor carriers were in violation of Sections 217(b), 222(c) and 225 of the Interstate Commerce Act. (49 U.S. Code, Sections 317(b), 322(c) and 324(a)). (R. 2)

Section 217(b) provides that no common carrier shall charge a different rate than that provided in its tariffs, nor refund by any device any portion of the rates so specified, nor extend any privileges or facilities for transportion except such as are specified in the tariffs. Section 222(c) makes it a misdemeanor to rebate or refund any portion of the tariff rates. Section 225 requires that when the owner of the property transported renders any service connected with transportation, the allowance therefor must be just and reasonable and shall be set forth in published tariffs. These sections of the statutes are printed in full in the Appendix to the brief attached in support of this petition.

The parties made counter motions for summary judgment and filed a stipulation of agreed facts upon which the District Court decided that the payments to petitioner were, in effect, payments to the shipper and rebates within the condemnation of the law. (R. 66-7) The decree enjoined petitioner and the motor carriers from continuing the payments to petitioner without tariff provision therefor. (R. 68-70)

On appeal, the court below found that no shipper obtained special benefit through the arrangement. However, the court held that the payments are prohibited rebates even though they were not made to a shipper and no shipper benefited therefrom, directly or indirectly. It affirmed the decree, with one of the three judges dissenting. (R. 79-87)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 204(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U.S. Code, Sec. 347). The judgment of the lower court was entered January 17, 1948. (R. 89) This petition was filed on April 9, 1948.

QUESTIONS PRESENTED.

This case presents three important questions of Federal law which have not been, but should be, settled by this Court.

1. Do payments made by carriers in compensation for services rendered by an agent, which payments do not reach or benefit any shipper, constitute a "refund" of a portion of the rate paid by shippers within the meaning of the prohibition contained in Section 217(b) of the Interstate Commerce Act?

This question arises because the court below rejected the charge that the payments were for the benefit of the shippers but held that they were nevertheless unlawful refunds because the carriers retain (for their own use) less than the rate paid by the shipper and less than they would retain if they operated the station facilities with their own employees.

2. Does Section 217(a) of the Interstate Commerce Act prohibit carriers from using an agent to provide station facilities unless and until the arrangement therefor is shown in the carriers' tariffs?

This question arises because the court viewed the arrangement as resulting in a different service from that provided in the tariffs and held that Congress intended in Section 217(a) to compel carriers to collect identical charges for identical service.

3. Does Section 222(b) of the Interstate Commerce Act require carriers to show in their tariffs the payments which they make to agents who are not shippers?

This question arises because the District Court found that respondent stood in the shoes of the shipper and payments to it must be published in tariffs. Petitioner assigned error to that conclusion in the court below, which failed to decide this question. The opinion of the dissenting judge states that the majority ignored this vital question and that it should have reversed the trial court.

4. Do the stipulated facts support the conclusions of the District Court, which were in effect affirmed by the court below, that petitioner stands in the shoes of the shippers or that the employment of petitioner to furnish and operate receiving stations constitutes an extra service to the shipper in excess of the carriers' tariff obligation.

This question arises because the Commission asserted and the District Court concluded that petitioner's services were rendered on behalf of the tenants of petitioner. The court below rejected this charge but failed to make clear its own conclusions.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner urges that this court should review the decision of the court below for the following reasons:

1. The case presents important questions of Federal law which should be settled by this court. These questions arise in connection with a course of conduct which many common carriers have followed over a long period. The Commission applied to the courts for a judicial determination of the disputed questions raised by its staff. The parties and the public need a decision by this Court to settle authoritatively the matters in controversy.

2. The court below has decided the questions presented in a way that conflicts with applicable decisions of this court. In holding that the statute prohibits payments which are not made to, or for the benefit of the shipper, the lower court misinterpreted the decision of this Court in *Union Pacific R. Co.* v. *United States,* 313 U.S. 450.

3. The court below failed to review the conclusions which the trial court reached from the stipulated facts. It expressed views contrary to the conclusions of the District Court, yet failed to enter appropriate findings or conclusions and left the parties in confusion as to the legal significance which it attached to the facts.

Wherefore, petitioner respectfully submits that this case calls for the exercise by this court of its supervisory power by granting a Writ of Certiorari and thereafter reversing the decision of the United States Circuit Court of Appeals.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

NORTH PIER TERMINAL CO.,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The District Court wrote no opinion. Its findings and conclusions are reproduced in full in the printed record. (R. 60).

The opinion in the Circuit Court of Appeals is reported in 164 F. 2d 640 and in the printed record. (R. 79)

JURISDICTION.

This court has jurisdiction to require by certiorari the certification to it for determination of any case in the Circuit Court of Appeals. (28 U.S. Code, Sec. 347) This petition was filed on April 9, 1948, within three months after the judgment of the court below was entered, January 17, 1948. (R. 89) (28 U.S. Code, Sec. 350)

This case involves important questions of Federal law which have not been, but should be, settled by this court.

(Supreme Court Rule 38, Par. 5(b)) This court has not considered the proposition here asserted, that the Interstate Commerce Act prohibits as rebates payments that are made to one who is not a shipper and which do not reach or benefit any shipper, directly or indirectly.

The decision of the court below is in conflict with applicable decisions of this court. (Supreme Court Rule 38, Par. 5(b)). This court decided in *Union Pacific R. Co.* v. *United States,* 313 U.S. 450 that concessions made to shippers in respect of transportation were rebates although such concessions were made by one not a carrier, where the concessions were in the interest of a carrier who extended financial aid and played a dominating part in securing such concessions for the shipper. The court below has misinterpreted this decision as holding that a prohibited rebate need not be to the shipper.

The court below has departed from the accepted and usual course of judicial proceedings by failing to require the entry of findings and conclusions consistent with its stated opinion and in failing and refusing to decide questions raised by petitioner's specification of errors. (Supreme Court Rule 38, Par. 5(b))

Jurisdiction in this case is sustained by the decision in *General American Tank Car Corporation* v. *El Dorado Terminal Company,* 308 U.S. 422, 424.

STATEMENT OF THE CASE.

The facts of the case have already been sufficiently stated in the preceding petition, page 1. The case was submitted on a stipulation of facts, which is set forth in full in the printed record. (R. 51)

ERRORS RELIED UPON.

1. The United States Circuit Court of Appeals erred in failing to set aside each of the conclusions which the trial court drew from the stipulated facts and to which petitioner assigned error in the court below. (R. 73) The court further erred in failing to require the entry of findings and conclusions consistent with its expressed opinion.

2. The court erred in holding that remittances by a carrier to its agent are prohibited rebates even though such remittances are not made to a shipper and do not benefit a shipper directly or indirectly.

3. The court erred in holding that the statute requires tariff publication of arrangements whereby carriers employ an agent to provide station facilities.

4. The court erred in holding in effect that payments to one who is not a shipper must be published in the carriers' tariffs.

ARGUMENT.

Petitioner seeks a review of the case by this Court because the case involves novel and important questions as to the meaning and intent of the Interstate Commerce Act. Those questions should be settled by this Court in order that petitioner, motor common carriers, and the public may lawfully conduct their affairs with certainty. The decision of the court below conflicts with previous decisions of this Court and applies to the facts an unprecedented concept of the statute. In addition, the opinion of the court fails to spell out the legal significance of the facts or to state clearly the conclusions to be arrived at from those facts.

The relation between shipper and carrier as the test of rebates.

The stated basis for the complaint of the Commission was its assertion that the practices of petitioner and the motor carriers were for and in behalf of tenants of petitioner (i.e., the shippers). (R. 4) The Commission argued and the District Court adopted conclusions of law to the effect that the tariff rates of the motor carriers do not include the work done by petitioner, that the stations established under the contract were facilities maintained for the convenience of the shippers and were not freight stations of the carriers, and that it is not the function of the carriers to do the work for which they paid petitioner. (R. 66-7)

Petitioner assigned error to each of these conclusions of the District Court. (R. 72-3) In its opinion, the Circuit Court of Appeals did not sustain the conclusions. On the

contrary, the court observed that the assailed arrangement was undertaken because of congestion of carriers' trucks. (R. 80) The court noted that the service given the shippers under the assailed arrangement is not greater than the store-door pick-up provided in the tariffs. (R. 82) Finally, the court said that it was unable to appreciate how a shipper actually benefits from the arrangement. The court said (R. 82):

> Were we approaching this problem as an original proposition, without prior reading of the statute and decisions, we would have strong inclination to approve of any voluntary arrangement whereby parties simplified and expedited shipments in an efficient manner, without seeming detriment to others, for we are unable to appreciate how a shipper actually benefits by the Terminal Company's services, except for the availability of carts for carrying the merchandise to the "stations" of the Terminal Company, and these carts seem to be available to all tenants.

In this expression the court effectively discarded the proposition upon which the complaint of the Commission was based, namely that the services rendered and payments made were for the substantial benefit of the tenant shippers rather than in aid of the motor carriers in performing their transportation functions.

Nevertheless, the court affirmed the decision of the District Court, stating that in its judgment the statutes made such affirmance mandatory. (R. 83)

The court arrived at this conclusion from a reading of the language of Sec. 217(b) which, in the words of the court, "provides that the carrier shall not receive a 'less or different compensation for transportation * * * between the points enumerated in the tariff than the rates * * * specified in the tariffs * * * and no such carrier shall *refund or remit in any manner or by any device,* directly or in-

directly, or through any agent, or broker, or otherwise, any portion of the rate * * *.' " The court then observed that "The motor carrier received in fact less than the tariff listed because it paid out 4 cents per hundred weight for extra services." (R. 83)

Parenthetically, if the test of a prohibited refund is as the court stated, then payments to local cartage operators for pick-up and delivery service, or even wages to employees, come within the prohibition, since these come out of the carriers' gross revenues.

Petitioner contended that payments by carriers are not rebates unless they reach or benefit the shipper directly or indirectly. As to this, the court conceded that "Probably such rebate is usually in fact made to the shipper." However, the court found authority for holding that the rebate which is prohibited need not be to the shipper, citing the decision of this court in *Union Pacific Railroad Company* v. *United States*, 313 U.S. 450.

In so doing the court misinterpreted the decision of this Court in the *Union Pacific* case. That case is authority for holding that a *direct payment* by the carrier to the shipper is not necessary to the existence of a rebate. It is not authority for holding that a rebate exists in the absence of any concession reaching the shipper, directly or indirectly. In that case, the shippers received large sums of money as an inducement to move their places of business to a new terminal from which they would ship via the Union Pacific. In addition, the shippers received free rent of the leased space. There were clearly substantial concessions and benefits to the shippers in interest of a particular carrier. There are none in this case.

The direct concessions in the *Union Pacific* case were made by the municipal authorities who built the terminal. However, the opinion of this Court shows that the Union

Pacific took over $3,000,000 of municipal bonds on which interest could be paid only out of the income of the terminal. Further, the Union Pacific maintained a dominating position in the entire arrangement and paid out large sums of money on the project.

There is, therefore, an essential difference in principle between that case and this. In the *Union Pacific* case money was paid to shippers and expended for the benefit of shippers. The money paid did not come directly out of carrier funds, although the payments were in the interest of a particular carrier and were promoted by it. In this case the money is not paid to the shipper or for the benefit of any shipper. The money does come directly out of carrier funds just as does the payment of any other legitimate carrier operating expense. The practice in the *Union Pacific* case affected the relation between shipper and carrier and was intended to induce the shipper to use the services of that carrier. In this case the relation between the shipper and carrier is unaffected by the payments. These are not analogous situations either in law or in fact and the lower court erred in treating them as identical.

The decision of the court below is in conflict with the many decisions of this Court in which it is made clear that the primary purpose of prohibiting rebates was to promote equality of treatment among shippers. The purpose was not to restrict or hamper carriers in the employment of facilities or agencies for the performance of their transportation duties. As this Court said in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U.S. 361, 391:

> The purpose of the Interstate Commerce Act is to secure equality of rates as to all, and to destroy favoritism by any means or device whatsoever, and to place all shippers on equal terms.

In *Merchants Warehouse Co.* v. *U. S.*, 283 U.S. 501, this Court struck down a discriminatory arrangement whereby the railroads employed favorite warehousemen to maintain freight stations for the purpose of attracting their traffic. Even in such a case the Court took occasion to say:

> We may assume that the railroads, in order to carry on their business as interstate carriers, are not bound to maintain their own freight stations, but may contract with others to supply them and to perform there the transportation services which they are under a duty to perform.

In affirming the decision of the District Court despite its own view that the condemned arrangement was desirable and involved no special concession to a shipper, the court below went beyond all previously expressed concepts of the intent of Congress. In the words of the dissenting judge (R. 85):

> I make bold to assert that no court has heretofore gone so far. I suspect that the Commission will be equally surprised with the carriers at the holding.

The statutory requirement of tariff publication.

TARIFF AUTHORITY FOR THE TRANSPORTATION SERVICE RENDERED.

The opinion of the court below contains language which suggests, but does not clearly state, that the practices of the parties were thought to result in special transportation services for which tariff authority was required in addition to the provision for store-door pick-up. The court cited the provisions of Sec. 217(a), which requires the carriers to file tariffs showing all rates for all services. The court said that "Congress intended to compel carriers to exact identical charges for identical service between the same points of service."

From this it may be conceived that the court had in mind

that the receiving of shipments through petitioner's receiving stations involved a different service from that performed when the carrier receives the shipment at the individual shipper's loading platform without the intervention of petitioner as carrier's agent. If so, the court misinterpreted the legal significance of the facts. The service rendered when petitioner receipted for the shipments as carrier's agent and, in conjunction with the carriers, provided the store-door pick-up to which the shipper is entitled under the published rates, is the same service, from the standpoint of the shipper, as that rendered when the store-door pick-up is made at any one of the 90 doors and platforms available on petitioner's premises. Put differently, the facts are clear that without the assailed arrangement each shipper was entitled to tender his freight at any one of the 90 doors or platforms, including those at which the stations are located. The employment of petitioner as carrier's agent did not change that. The shipper still tenders his freight for transportation at any one of the doors or platforms, including the ones at which the stations are located.

The Commission agrees with petitioner that the law requires no tariff authority for maintaining freight stations. (R. 53-4)

TARIFF AUTHORITY FOR THE PAYMENTS TO PETITIONER.

In addition to the question of tariff authority for service rendered, the complaint charged that the statute requires tariff authority for the payments to petitioner for rendering those services. (R. 5) This allegation relates to Sec. 225 of the statute, which requires tariff authority for allowances paid to the owner of the property transported when he renders services in connection with transportation. The District Court concluded that petitioner stands in the

shoes of the shippers and that payments to it are required to be published by that section of the statute. (R. 66-7) Petitioner assigned error to this conclusion. (R. 73) Yet the opinion of the court below contains no mention of that question. In the opinion of the dissenting judge, the failure of the majority to pass upon that vital question was pointed up forcefully. The judge stated (R. 85):

> I agree with the Commission that this order can be sustained only on the theory that the Terminal was acting for and on behalf of the shippers, but I disagree with the Commission that there is any room for such a conclusion on the facts as stipulated. The majority, as I understand the opinion, ignores this vital issue upon which the case was tried below and upon which it is presented here, and holds that the services were illegal, irrespective of whether the services performed by Terminal were on behalf of the carriers or the shippers.

CONCLUSION.

Petitioner and the motor common carriers entered into this arrangement in an attempt to provide economical and efficient means for the handling of interstate freight. Their purpose in so doing was clearly consistent with the purposes of Congress as expressed in the National Transportation Policy, enacted as a preamble to the Interstate Commerce Act and intended to be controlling in the interpretation of all of the provisions of that statute.

If in so doing, the parties have adopted methods or performed acts which contravene the provisions of the statutes, then those methods and actions must be modified or abandoned. However, in order properly to do so, petitioner and the carriers are entitled to a clear and certain interpretation of the law by the courts, from which they can plot their course for the future. That has not been done in this

case and the questions presented deserve the authoritative treatment which only this Court can give.

The importance of the questions presented in this case go far beyond the question whether this petitioner may resume the particular arrangement here involved. This court may judicially notice the countless arrangements of common carriers by railroad, by water and by motor vehicle wherein such carriers employ agents and independent contractors to assist them in the performance of their transportation functions. If the decision of the court below is allowed to stand in this case, it will have a widespread effect to disrupt present arrangements and practices as to which no one in the Commission or in the industry consider any impropriety to be involved.

Petitioner asks the Court to apply in this case the one basic test which all its previous decisions have applied in similar cases. That test is whether the shipper receives either directly or indirectly, any concession or benefit so as to induce him to make shipments via a particular carrier.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act.

Sec. 217(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 217(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or

foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of section 1(7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

Sec. 222(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

Sec. 225 If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 728

NORTH PIER TERMINAL COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion but made comprehensive findings of fact and conclusions of law (R. 60–68). The opinion of the Circuit Court of Appeals (R. 78–87) is reported in 164 F. 2d 640.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 19, 1947 (R. 87). A petition for rehearing was denied on January 9, 1948 (R. 89). The petition for a writ of cer-

tiorari was filed on April 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. Whether it is lawful for common carriers of property by motor vehicle to pay, and for the owner of a building to receive, payments which are not provided for in the carriers' published tariffs and which are given for performance by the landlord, in connection with certain shipments from tenants of the building, of certain services which are not specified in the tariffs and which the carriers themselves are not obligated or authorized thereunder to perform.

2. Whether such a rebate paid by a common carrier of property by motor vehicle is legalized by reason of the circumstance that it is not paid to shippers but to the owner of the building where shippers are tenants and the landlord gathers, guards, stores, and segregates shipments from tenants for delivery to carriers for transportation.

STATUTES INVOLVED

The pertinent provisions of Sections 217 (a), 217 (b), 222 (b), 222 (c), 225 of the Interstate Commerce Act, and Section 2 of the Elkins Act, are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Petitioner owns a building in Chicago and leases premises to approximately seventy-five

tenants, who ship and receive freight in interstate commerce over the lines of more than a hundred motor carriers (R. 52, 61). Petitioner and some twenty of such carriers,[1] named as defendants in the suit, have entered into contracts whereby petitioner performs certain services in connection with shipments from tenants in the building (R. 52, 61). Each of such defendant motor carriers pays to petitioner monthly an amount equal to four cents per hundred pounds on all freight handled by petitioner for transportation by such carrier (R. 54, 65).

Petitioner assigns its employees and space at two locations in its building for handling such shipments from its tenants (R. 52, 63). At these so-called "stations" the defendant carriers having contracts with petitioner do not exercise control over the performance of the service rendered by petitioner, and petitioner's employees engaged in such service perform other duties for petitioner (R. 53, 64).

Petitioner's service is not available to shippers other than tenants of petitioner's building (R. 47, 53, 64). Tenants of the building are not required to use petitioner's service, but may and do turn over some shipments directly to carriers; and

[1] Of the twenty carrier defendants in the District Court, only five joined in petitioner's appeal to the Circuit Court of Appeals. The instant petition for a writ of certiorari is presented by petitioner alone, none of the carriers having joined therein.

all incoming shipments are delivered directly to the tenants of the building by the carriers, without handling by petitioner (R. 54, 65). After outgoing shipments have been turned over to the carrier by petitioner, they are handled in the same manner as shipments turned over directly to the carrier by shippers; the shipments are transported to the carrier's regular public freight stations and there assembled and loaded for transportation in interstate commerce (R. 48). None of the defendant carriers lists a telephone on petitioner's premises nor advertises the so-called "stations" at that building as places where they receive freight for transportation (R. 54, 64).

The service furnished by petitioner's employees in connection with shipments from tenants in its building consists in the reception of such shipments from tenants, storage thereof in wire enclosures at the so-called "stations," and delivery thereof to the carriers' trucks. Petitioner's employees assume custody of the shipments, guard them, store them, segregate and arrange them in separate lots according to the motor carriers that are to transport them, notify the carriers, and turn over the shipments to the carriers' trucks, loading them by means of "skids" and "lift trucks" furnished by petitioner. (R. 52–53, 63–64.) In some instances petitioner's employees take shipments from the premises of shippers located on the first floor of the building (R. 53, 64). The wire enclosures where shipments are

stored at the so-called "stations" are not directly accessible to trucks but are some distance inside the warehouse building, and petitioner's employees move the shipments therefrom, which are to be loaded, to and across the dock to the carriers' trucks (R. 52–53, 63–64).

Each of the defendant motor carriers publishes tariffs providing that the rates include one pick-up and/or delivery from or to shipping department directly accessible to trucks at consignor's or consignee's warehouse, store, place of business or residence. The same rates apply whether or not the shipments from petitioner's tenants are handled by petitioner. The full tariff rates are collected directly from shippers. No part of the payments received by petitioner from the carriers is paid to the shippers or consignees. The tariffs contain no provision for the rendition of the above-described services performed by petitioner's employees or for payments to petitioner. (R. 54, 65.)

The District Court enjoined further payments to petitioner for the services, holding that the so-called "stations" maintained by petitioner in its building are not public freight stations of the defendant carriers, but clearly appear to be a facility which petitioner maintains for the convenience of its tenants (R. 66); that it is not the function of the defendant carriers, under their tariffs, to furnish services such as maintaining custody over, guarding, sorting and assembling shipments in warehouses, or to furnish instrumentalities such as

"skids" and "lift trucks" to shippers; that the function and duty of the carriers, according to their tariffs, is to make a free pick-up or delivery of shipments at a dock or other place directly accessible to trucks, and thereafter to transport the shipments; that if other services or facilities are to be furnished, or paid for, by the carriers, those services and facilities must be specified in the tariffs, together with the charges of the carriers therefor (R. 66); and that the payment of four cents per hundred pounds by the defendant carriers to petitioner, without proper tariff provision therefor, was, therefore, an unlawful rebate (R. 67). On appeal, the Circuit Court of Appeals (one judge dissenting) affirmed this ruling (R. 79–85).

ARGUMENT

In affirming the decision of the District Court, the majority of the court below said:

> The heart of the appellants' position is that the carriers' payment of 4¢ per hundredweight is to one *other than the shipper,* and therefore needs no publication in its tariffs, and is violative of neither statute nor published tariff. As an added basis for its position, it asserts that the assembling rooms at the building were "stations" and therefore legally permissible establishments.
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> * * * * *
>
> Our reading of the statutes above quoted, convinces us that Congress intended to

> compel carriers to exact identical charges for identical service between the same points of service. Congress seemed determined to prohibit even the slightest deviation from such norm. [R. 82]
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> * * * * *
>
> When Congress in the language just quoted went to such great lengths to cover all conceivable situations which a carrier's ingenuity in solving situations might devise, we can not construe such language to require the rebate or refund to be to the one making the original payment—the shipper. Probably such rebate is usually in fact made to the shipper. Here it was not. If Congress had intended to limit proscribed rebates to shipper, it could easily have so stated. Instead, it seemed bent on traveling in the other direction—away from narrowing restricted or condemned rebates. [R. 83]

It is submitted that the decision of the Circuit Court of Appeals, affirming the District Court, is correct. The undisputed facts, as found by the courts below,[2] demonstrate that the services furnished by petitioner, for which petitioner is paid by the carriers, do not constitute transportation services which it is the duty of the carriers under their published tariffs to perform; and previous decisions of this Court have established that it is an

[2] The court's findings are based upon a record containing a detailed stipulation covering all the relevant facts (R. 51–55).

unlawful rebate for carriers to furnish without charge, or pay someone else for furnishing, service which differs from that specified in the carriers' published tariff and exceeds the carriers' transportation obligation and discriminates between shippers. It is equally well established that a rebate is not legalized by reason of the circumstance that it is not paid by a carrier to a shipper.

1. In view of the terms of the published tariffs, it is clear that, as the District Court found (R. 66), it is no part of the carriers' transportation obligation as specified in their tariffs to furnish services such as were provided by petitioner. Such services do not constitute transportation; they are steps preliminary to transportation. They are not part of the carriers' duty under the tariffs. They are services which the shipper is bound to perform, or to have performed for his account, if he desires them.

Examination of the tariffs discloses that it is not the function of the carriers to furnish services such as maintaining custody over, guarding, sorting and assembling shipments in warehouses so that they will be tendered to the trucks of the proper carrier for transportation. The carriers are not authorized by the tariff provisions to furnish instrumentalities such as "skids" and "lift trucks" to shippers. The function and duty of the carriers, as specified in their tariffs, is merely to make a single pick-up or delivery of

shipments at a dock or other place directly accessible to trucks, and to transport the shipments.

These conclusions, drawn by the courts below, are the only rational inference warranted by the undisputed facts which have been stipulated by the parties. Paragraph 12 of that stipulation reads (R. 54):

> Each of the defendant motor carriers publishes and has on file with the Interstate Commerce Commission tariffs which contain the rates and charges for transportation of the aforesaid shipments, and said tariffs provide that *the rates include one pick-up and/or delivery of such shipments from or to shipping department directly accessible to trucks* at consignor's or consignee's warehouse, factory, store, place of business or residence. *The tariffs contain no further provision for the rendition of the aforesaid services* [rendered by petitioner] *by either the carriers or by North Pier Terminal Co. or for such payments to North Pier Terminal Co.* [Italics supplied.]

In view of the terms of these tariffs, it is manifest that for the carriers to perform, or to pay petitioner for performing, the services involved, would constitute a plain violation of Section 217 (a) requiring the publication of tariffs "showing all the rates, fares, and charges for transportation, and *all services in connection therewith.*" [Italics supplied.] Equally clear is the violation of Section 217 (b), which provides that no carrier shall

> refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or *extend to any person any privileges or facilities* for transportation in interstate or foreign commerce *except such as are specified in its tariffs:* * * * [Italics supplied.]

In view of the absence of any tariff provision covering services of the sort performed by petitioner, payment for such services by the carriers would not be legalized even if they were deemed to be those of a bona fide public freight station maintained by the carriers.[3] But obviously petitioner's services were not those of a bona fide public freight station maintained by the carriers for the reception of freight generally. The service was limited to outbound traffic of tenants in the petitioner's building, and consisted only of such preliminary steps as other shippers are obliged to perform at their own expense.

The service petitioner furnished its tenants was precisely the same as that furnished by an apartment house maintaining a central desk where

[3] Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 508, and *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 506, where the Court held that the warehouses were not bona fide public freight stations, but were used only by shippers who utilized certain warehousing services in addition to the transportation services which the carriers were bound to perform. The same situation exists in the case at bar.

tenants have the privilege of leaving bundles of laundry, or suits to be pressed, instead of being required to make their own arrangements with the laundry or cleaning establishment for collection and delivery at their own apartment door. Such service may well be beneficial to all parties concerned, and an advantageous feature or "selling-point" attracting tenants to petitioner's building. But under the Interstate Commerce Act it can not be maintained at the expense of carriers obliged to observe their published tariffs, and required by law to restrict their service to what is specified therein.

Indeed, on traffic delivered directly by tenants in petitioner's building to carriers, the carriers under their tariffs are obliged to and do perform the same service and collect the same rates as on traffic handled by petitioner.[4] This clearly shows that the services rendered by petitioner are not part of the carriers' duty but must be deemed to have been rendered on behalf of the shippers. If the carriers were permitted to perform, or pay

[4] It could perhaps even be questioned whether petitioner's "stations," being wire enclosures *inside* the building, and some distance from the docks, can actually be considered as "directly accessible to trucks" as required by the tariffs. In any event, assuming that the "stations" do satisfy the tariff requirements, the service performed by petitioner is furnished without any additional charge. Shippers using petitioner's service thus obtain such service, plus the carriers' transportation service, for the same rate as is paid for the transportation service alone by other shippers who deliver shipments directly to the carriers for transportation.

for, such services, they would plainly be guilty of a discrimination in service, amounting to a rebate, of the very sort which Congress firmly intended to extirpate and "cut up by the roots." *Louisville & Nashville Railroad Co.* v. *Mottley,* 219 U. S. 467, 478.

The circumstances that upon completion of the services rendered by petitioner the carrier must then perform the same transportation service which they would have performed if the traffic had been received directly from the shippers, likewise shows that petitioner's services form no part of the transportation function which the carriers are permitted and required by law to perform under the terms of their tariffs. The attempt to designate the two locations on petitioner's premises as a "station" is altogether misleading, and in the light of the actual facts cannot be regarded as having any legal significance. The differences between petitioner's activities and those which a carrier would perform at a bona fide public freight station are obvious. In fact, the record indicates that traffic delivered to carriers by petitioner is then transported by them to their genuine public freight stations, where it is handled in the same manner as traffic received directly from shippers.

Petitioner's service is thus clearly seen to be something additional, something superadded, something separate and distinct from, and not embraced within, the normal and lawful transpor-

tation function which carriers are authorized and obliged to perform and to specify with definiteness and certainty in the provisions of their published tariffs. Indeed, it is conceded and stipulated that there is no tariff authority whatsoever for the services for which petitioner was being paid four cents a hundred pounds by the carriers until enjoined (Pet. 3, R. 54).

2. The carriers may not lawfully pay petitioner for performing service which it is not the duty of the carriers to perform. This proposition is almost an axiomatic principle of transportation law, and has been established in a long line of cases. While a carrier may pay either a shipper or any other agent for performing services which it is the carrier's duty to perform,[5] it may not itself perform free of charge, or pay someone else for performing, any services in excess of its transportation obligation; and the precise scope of such obligation must be specified in the carriers' published tariffs.[6] *Mitchell Coal Com-*

[5] The carrier has the option of performing itself any service which it has the duty to perform; or it may elect to employ some shippers, but not others, as its agents to perform such service. *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 232 U. S. 199, 214; *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, 293.

[6] While the mere fact of publication in tariff form does not legalize an allowance for service which the carrier is under no duty to perform (*Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 511; *B. & O. Railroad Company* v. *United States*, 305 U. S. 507, 526; *Anaconda Copper Mining Company* v. *United States* (D. Mont., Civil No. 227),

pany v. *Pennsylvania Railroad Company,* 230 U. S. 247, 263; *Merchants Warehouse Company* v. *United States,* 283 U. S. 501, 510–11, 513; *B. & O. Railroad Company* v. *United States,* 305 U. S. 507, 524; *United States* v. *American Sheet & Tin Plate Company,* 301 U. S. 402; *United States* v. *Wabash Railroad Company,* 321 U. S. 403, 410; *Corn Products Refining Company* v. *United States,* 69 F. Supp. 869 (N. D. Ill.) affirmed, 331 U. S. 790.

The foregoing authorities, and other terminal allowance cases growing out of the Commission's decision in *Ex Parte No. 104,* 209 I. C. C. 11, make it clear that the furnishing of free service in excess of that covered by the published line-haul rates constitutes a rebate just as much as the refunding of a part of the charges collected. See also *United States* v. *Metropolitan Lumber Company,* 254 Fed. 335, 340–1 (D. N. J.). It has frequently been declared by this Court that the purpose of Congress in the Interstate Commerce Act and legislation supplemental thereto was to extirpate and "cut up by the roots" every form of discrimination, favoritism, and inequality.

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decided December 30, 1947), no issue with respect to the effect of tariff publication as a device for unduly extending the permissible limits of the carrier's transportation obligation is presented in the case at bar, since the services involved are not specified at all in the published tariffs. No issue arises here as to how far a carrier may go in enlarging by tariff publication the scope of its duties.

Louisville & Nashville Railroad Company v. *Mottley,* 219 U. S. 467, 478.

3. Likewise it is well settled that a rebate is not legalized by reason of the circumstance that it is not effectuated through the form of a payment by a carrier to a shipper. *Howitt* v. *United States,* 328 U. S. 189, 192; *United States* v. *Koenig Coal Co.,* 270 U. S. 512, 519; *Union Pacific Railroad Company* v. *United States,* 313 U. S. 450; *General American Tank Car Corporation* v. *El Dorado Terminal Company,* 308 U. S. 422; *El Dorado Oil Works* v. *United States,* 328 U. S. 12; *Interstate Commerce Commission* v. *Reichmann,* 145 Fed. 235 (C. C. N. D. Ill.); *Spencer Kellogg & Sons, Inc.* v. *United States,* 20 F. (2d) 459 (C. C. A. 2), certiorari denied, 275 U. S. 566; *C. & D. Motor Delivery Company* v. *United States,* 150 F. (2d) 250 (C. C. A. 6); *Terminal Warehouse Company* v. *United States,* 31 F. (2d) 951 (D. Md.); *United States* v. *Miller,* 18 F. Supp. 389, 390–1 (D. Nebr.); *Interstate Commerce Commission* v. *Jones* (N. D. Okla., Civil No. 1692, decided May 16, 1946), 6 Fed. Carrier Cases Par. 80,400.

Particularly applicable to the facts in the case at bar is the following language from Judge Soper's opinion in *Terminal Warehouse Company* v. *United States,* 31 F. (2d) 951, 958:

> The contention seems to be that the allowance paid to it has no relation to the contract of shipment, and is therefore outside

> the purview of the terms of the Interstate Commerce Act. *But it is not a sufficient answer to say that the allowance is not paid to the shipper* or consignee. *In any event, it is paid by the carrier for a service rendered to the shipper's goods,* and unless the service is performed for all shippers alike at the carrier's station, it may not lawfully be given, under the terms of the tariff or of the act of Congress. [Italics supplied.]

And squarely in point is the recent decision in *C. & D. Motor Delivery Company* v. *United States,* 150 F. (2d) 250 (C. C. A. 6). In that case a warehouse company, just as petitioner did in the case at bar, performed the service of concentrating shipments *"from various doors* of the thirty delivery doors of the defendant, all directly accessible to the trucks of the C. & D. Motor Delivery Company, *at one such door directly accessible to such carrier's trucks."* The tariffs in effect likewise provided for *"one pick-up* from shipping department directly accessible to trucks." [p. 252.] The C. & D. Motor Delivery Company paid the warehouse an allowance of $2.26 for the assembling and loading services performed by the warehouse in concentrating the shipments. On those facts the court, even under the strict construction required for the purpose of a criminal prosecution, held that the practice amounted to a violation of Section 217 (b) of the Act suf-

ficient to justify a prosecution under Section 222 (c).

In view of all these circumstances, it is clear that the payment to petitioner of four cents per hundred pounds on shipments handled by petitioner is an unlawful rebate. Congress intended that a carrier performing for different shippers an identical transportation service specified in its tariff should receive the same compensation therefor, regardless of the number of persons handling the goods for the shipper's benefit prior to delivery thereof to the carrier for transportation. All preliminary services prior to the commencement of the carrier's transportation obligation, such as those performed by petitioner herein, must be treated as performed for the account of the shipper. Hence they cannot be paid for by the carriers, and the allowance received by petitioner constitutes an unlawful rebate.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act (as amended, 49 Stat. 543; 54 Stat. 898; 49 U. S. C. 317 (a), 317 (b), 322 (b), 322 (c), 324 a).

Section 217 (a):

> Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Section 217 (b):

> No common carrier by motor vehicle shall charge or demand or collect or receive

a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1 (7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

Section 222 (b):

If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or

condition and enjoining upon it or them obedience thereto.

Section 222 (c):

Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

Section 225:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may,

after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

Elkins Act (32 Stat. 847; 49 U. S. C. 42).

Section 2:

That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

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